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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

RICHARD JOHNSON, Plaintiff and Respondent, v. DOUGLAS HUMPHREY, Individually and as Successor in Interest, etc., Defendant and Appellant.	E072186 (Super.Ct.No. INC1207805) OPINION

APPEAL from the Superior Court of Riverside County. Kira L. Klatchko, Judge. Reversed.

Allione & Associates and Paul R. Allione for Plaintiff and Respondent.

Christopher Kelley for Defendant and Appellant.

Since 2012, Richard Johnson and Douglas Humphrey have been litigating over their respective rights to a piece of vacant land in Rancho Mirage. Johnson filed this particular action against Humphrey and others in 2016. After Humphrey filed a special

motion to strike pursuant to section 425.16[1] (anti-SLAPP motion), Johnson voluntarily dismissed the entire action. Nevertheless, as we held in a prior appeal, Humphrey was entitled to a ruling on the anti-SLAPP motion for the purpose of determining whether he was entitled to attorney fees.

The trial court denied the anti-SLAPP motion; it ruled that the action was merely a property dispute and did not arise from any protected activity by Humphrey. Humphrey appeals again.

We will reverse. Humphrey showed that his claim to the property in this action is based on a stipulation that he filed in a prior action. In that stipulation, he and three other claimants to the property (not including Johnson) purported to stipulate that Humphrey owned 85 percent of the property, waived and released all claims against each other, and asked the trial court to partition the property among them. In this action, Johnson sought to prove that the stipulation was ineffective. Accordingly, this action, as against Humphrey, arose from Humphrey's exercise of his right to petition the courts.

Moreover, Johnson failed to show that the action had even minimal merit. Hence, the motion should have been granted.

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[1] This and all further statutory citations are to the Code of Civil Procedure, unless otherwise indicated.

I

THE CLAIMANTS TO THE PROPERTY

This action involves 1.6 acres of vacant land in Rancho Mirage. Val Janelunas owned the property when he died in 2002; as far as is known, he left no will. Humphrey had been married to Janelunas's sister, who died in 1999. Other claimants to the property include Jana Watson, Thomas Terry Watson, and Gail Ann Watson Devault (collectively Watsons), who are (or claim to be) cousins of Janelunas. Johnson claims to own the property free and clear of all other claims by virtue of adverse possession.

II

THE PRIOR ACTION

As we will discuss in more detail in part IV, *post*, Humphrey requested judicial notice of the following matters below, and we take judicial notice of them on appeal.

In 2012, Humphrey filed a complaint to quiet title to the property (prior action). It alleged that he was entitled to the property by abandonment, adverse possession, and/or inheritance from his deceased wife. It specified the defendants not by name, but as "all persons unknown, claiming any legal or equitable right, title, estate, lien or interest . . . adverse to [Humphrey's] title." (Capitalization altered.)

In July 2013, Johnson filed a demurrer, arguing, among other things, that matters subject to judicial notice demonstrated that Humphrey had no interest in the property.

In September 2013, Humphrey filed an amended complaint. This time, he specifically named Johnson and the Watsons as defendants. He attached a "stipulation"

that he had entered into with the Watsons in June 2013. It stated that Humphrey owned 85 percent of the property and the Watsons owned 5 percent each; it asked the court to partition the property between them by sale. It also included a mutual release.

In October 2013, Johnson filed another demurrer. It was sustained on the ground that the stipulation was ineffective and thus Humphrey had no interest in the property. Accordingly, the action, as against Johnson, was dismissed.

Humphrey appealed, but in 2015, we affirmed. We held that he was bound by certain previous judicial admissions that the Watsons had no interest in the property; accordingly, he could not allege that they gave him any interest in the property by way of the stipulation.

At some point, the default of all remaining defendants was entered. In April 2016, Johnson, although no longer a party, moved to dismiss the complaint as against *the other defendants*. The trial court denied the motion.

In May 2016, Johnson filed a motion to intervene. The trial court denied the motion, because it was untimely and because Johnson had not submitted a proposed complaint in intervention. Johnson sought review of this ruling by filing a mandate petition in this court, which we summarily denied.

III

THE PRESENT ACTION

In September 2016, Johnson filed this action against Humphrey and others. It alleged the following:

When Janelunas died, without a will, the property passed by operation of law to his wife, his children, and/or his mother.

Certain relatives (or purported relatives) of Janelunas, including the Watsons, claim to have an interest in the property, but they do not. Also, Humphrey claims to have an interest in the property as the Watsons' "assigne[e]"; however, as they have no interest in the property, neither does he.

Since 2005, Johnson has been in actual, open, and notorious possession of the property. Also since 2005, he has paid the property taxes on the property. Accordingly, by operation of adverse possession, Johnson is the true owner of the property, free and clear of any other claims.

The complaint asserted three causes of action against all defendants: (1) for declaratory relief as to who Janelunas's intestate successors were; (2) to quiet title in Johnson based on adverse possession; and (3) for fraud, in that Humphrey falsely represented in the prior action that that the Watsons were related to Janelunas and had assigned the property to him. However, in October 2016, Johnson voluntarily dismissed the third (fraud) cause of action as against Humphrey.

In November 2016, Humphrey filed an anti-SLAPP motion. At the same time, he also filed a demurrer, in which he argued, among other things, that the complaint was defectively verified.

In January 2017,the trial court struck the complaint as defectively verified, but granted leave to amend. It then denied the anti-SLAPP motion as moot.

In February 2017, Johnson voluntarily dismissed the entire action, without prejudice.

In March 2017, Humphrey filed a notice of appeal from the denial of his anti-SLAPP motion. In July 2018, we issued our opinion, holding that the trial court erred by denying the anti-SLAPP motion as moot; instead, it should have ruled on the motion for the purpose of determining whether Humphrey was entitled to attorney fees.

On remand, after hearing argument, the trial court denied the anti-SLAPP motion. It ruled that the first and second causes of action did not arise from protected activity.

IV

GENERAL ANTI-SLAPP PRINCIPLES

Section 425.16 provides: "A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." (§ 425.16, subd. (b)(1).)

"A court evaluates an anti-SLAPP motion in two steps. 'Initially, the moving defendant bears the burden of establishing that the challenged allegations or claims "aris[e] from" protected activity in which the defendant has engaged. [Citations.] If the defendant carries its burden, the plaintiff must then demonstrate its claims have at least

"minimal merit."' [Citation.] If the plaintiff fails to meet that burden, the court will strike the claim." (*Wilson v. Cable News Network, Inc.* (2019) 7 Cal.5th 871, 884.)

"We review de novo the grant or denial of an anti-SLAPP motion. [Citation.]" (*Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057, 1067.)

V

FAILURE TO RULE ON THE REQUEST FOR JUDICIAL NOTICE

Preliminarily, Humphrey contends that the trial court erred by failing to rule on his request for judicial notice. He asks us to take judicial notice pursuant to the request. Johnson does not object (or even respond) to this contention.

However, Johnson did object to the request below. He argued that, in deciding, for purposes of the anti-SLAPP motion, whether the complaint arose from protected activity, the trial court could not consider matters outside the complaint.[2] He also argued that, even if the court could take judicial notice of the documents themselves, it could not take judicial notice that facts stated in them were true. The trial court never ruled on the request or the objections.

Humphrey preserved this contention for appeal by filing a written request; it was not necessary for him to press for a ruling at the hearing. (See *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 533.) The trial court should have ruled on the request (see *id*. at p. 532 [trial court must rule on objections to evidence]), if only so we would have a clear record.

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[2] Despite his objection, Johnson himself filed a request for judicial notice.

In its ruling, the trial court made remarks which — although ambiguous — seem to mean it agreed that it could not consider matters outside the complaint.[3] If so, it erred.

Section 425.16, subdivision (b)(1) lays out both prongs of the anti-SLAPP test. Section 425.16, subdivision (b)(2) then provides: "In making its determination, the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based." "Its determination" necessarily refers back to both prongs.

Thus, the Supreme Court has stated that: "In deciding whether the initial 'arising from' requirement is met, a court considers 'the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.' (§ 425.16, subd. (b).)" (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 89.) Moreover, in the same case, it did, in fact, consider the declarations in deciding whether the "arising from" requirement had been met. (*Id*. at pp. 89-90; accord, *City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 79-80.) Finally, a standard treatise states that, in ruling on the "arising from" requirement, "the court considers the pleadings, declarations and matters that may be judicially noticed. [Citations.]" (1 Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2020) ¶ 7:992, p. 7(II)-61.)

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[3] Specifically, it said, "In order to determine that the allegations in the instant complaint are premised on protected activity, the Court would be required to look beyond the plain language of the complaint and to look instead to Johnson's subjective intent," which it then refused to do.

It also said, "The Court will not look beyond the pleadings in this case to examine the 'thrust of the [prior action]."

We will take judicial notice pursuant to the request. (Evid. Code, § 459, subd. (a).) Because our standard of review is de novo (see part IV, *ante*), this is an adequate appellate remedy.

However, Johnson was correct on one point: Even when we can take judicial notice of a document, we cannot take judicial notice of the truth of any otherwise inadmissible hearsay statements in it. (*Board of Pilot Commissioners v. Superior Court* (2013) 218 Cal.App.4th 577, 597, fn. 24.) In summarizing the evidence in part II, *ante*, we have abided by this limitation.

VI

SUPPLEMENTAL BRIEFING AND EVIDENCE ON REMAND

Humphrey also contends that the trial court erroneously allowed Johnson to file a supplemental opposition and to introduce additional evidence on remand.

A. *Additional Factual and Procedural Background*.

In our previous opinion, we directed the trial court "to set a new hearing and to rule on the merits of the [anti-]SLAPP motion for the limited purpose of determining whether Humphrey is entitled to an award of attorney fees and costs against Johnson."

On remand, the trial court duly set a hearing on the anti-SLAPP motion. After hearing argument, it called for supplemental briefing and continued the hearing.

In his supplemental brief, Humphrey argued that Johnson could not submit new evidence. Nevertheless, Johnson filed both a supplemental brief and a supplemental

request for judicial notice. Humphrey objected to the supplemental request for judicial notice. The trial court did not expressly rule on this objection.

B. *Discussion*.

"'"A reviewing court has authority to 'affirm, reverse, or modify any judgment or order appealed from, and may direct the proper judgment or order to be entered, or direct a new trial or further proceedings to be had.' [Citation.] The order of the reviewing court is contained in its remittitur, which defines the scope of the jurisdiction of the court to which the matter is returned." [Citations.] "The trial court is empowered to act only in accordance with the direction of the reviewing court; action which does not conform to those directions is void."' [Citation.]

"In addition to following the appellate court's remittitur, a trial court on remand must comply with the law of the case. '"'The doctrine of "law of the case" deals with the effect of the *first appellate decision* on the subsequent *retrial or appeal*: The decision of an appellate court, stating a rule of law necessary to the decision of the case, conclusively establishes that rule and makes it determinative of the rights of the same parties in any subsequent retrial or appeal in the same case.'"' [Citation.]" (*Rincon EV Realty LLC v. CP III Rincon Towers, Inc.* (2019) 43 Cal.App.5th 988, 997.)

Humphrey did not object to the filing of supplemental briefs; as noted, he filed a supplemental brief himself. Thus, he forfeited any contention that it was inappropriate to allow supplemental *briefing*. He preserved only the contention that it was inappropriate to accept supplemental *evidence*.

In any event, both contentions lack merit.

Our directions required the trial court to set a new hearing. We did not tell it how to conduct such a hearing. Thus, just as at any hearing on a motion, the trial court had discretion to continue the hearing, to call for further briefing, or to allow the parties to submit additional evidence.

Moreover, doing so did not violate the law of the case. In our prior opinion, we held that the trial court erred by denying the anti-SLAPP motion as moot. We did observe that one of the unfortunate consequences of this error was that, if Humphrey refiled his anti-SLAPP motion, "Johnson would get to file a new (and possibly improved) opposition." However, that just meant that Johnson had no *right* to file an improved opposition. We said nothing that would preclude the trial court from exercising its inherent power to call for a further opposition or further evidence, if that would help it do its job.

VII

THE MERITS OF THE ANTI-SLAPP MOTION

Humphrey contends that the trial court erred by denying his anti-SLAPP motion.

A. *The "Arising From" Requirement*.

Humphrey's position is that the complaint arises from his prosecution of the prior action, and in particular from the stipulation. Humphrey characterizes the stipulation as a "[s]ettlement [a]greement"; Johnson, on the other hand, characterizes it as "an obvious sham born from collusion."

Statements and acts in the course of a judicial proceeding are generally protected activity. (Code Civ. Proc., § 425.16, subds. (e)(1), (e)(2), (e)(4); see *ValueRock TN Properties, LLC v. PK II Larwin Square SC LP* (2019) 36 Cal.App.5th 1037, 1046.) "Although litigation-related activities constitute protected activity, 'it does not follow that *any* claims associated with those activities are subject to the anti-SLAPP statute. To qualify for anti-SLAPP protection, the moving party must [also] demonstrate the claim "arises from" those activities.' [Citation.]" (*ValueRock TN Properties, LLC v. PK II Larwin Square SC LP, supra,* at p. 1046.)

"A claim arises from protected activity when that activity underlies or forms the basis for the claim. [Citations.] Critically, 'the defendant's act underlying the plaintiff's cause of action must *itself* have been an act in furtherance of the right of petition or free speech.' [Citations.] '[T]he mere fact that an action was filed after protected activity took place does not mean the action arose from that activity for the purposes of the anti-SLAPP statute.' [Citations.] Instead, the focus is on determining what 'the defendant's activity [is] that gives rise to his or her asserted liability — and whether that activity constitutes protected speech or petitioning.' [Citation.] 'The only means specified in section 425.16 by which a moving defendant can satisfy the ["arising from"] requirement is to demonstrate that *the defendant's conduct by which plaintiff claims to have been injured* falls within one of the four categories described in subdivision (e) . . . .' [Citation.] In short, in ruling on an anti-SLAPP motion, courts should consider the elements of the challenged claim and what actions by the defendant supply those

elements and consequently form the basis for liability." (*Park v. Board of Trustees of California State University, supra,* 2 Cal.5th at pp. 1062-1063.)

Here, Johnson's first cause of action sought declaratory relief as to who Janelunas's intestate successors were. But why did he assert this cause of action against Humphrey, who was not and did not claim to be an intestate successor? Because Humphrey claimed an interest in the property by virtue of the stipulation. And whether the stipulation was effective depended on whether the *Watsons* were intestate successors.

Accordingly, Johnson specifically alleged that, because the Watsons were not intestate successors, Humphrey's "claim[] that the Watson[s] 'assigned' their interests to Humphrey" was invalid. It follows that Johnson's claim for declaratory relief *as against Humphrey* was based on *Humphrey's* conduct of entering into the stipulation.

Similarly, Johnson's second cause of action sought to quiet title in himself based on adverse possession. He asserted this cause against Humphrey, because Humphrey claimed an interest in the property by virtue of the stipulation. Thus, this claim *as against Humphrey* was based on *Humphrey's* conduct of entering into the stipulation.

The complaint therefore identified Humphrey as "an individual purporting to have an interest or claim of ownership to the real property at issue . . . ." While it did not specify the source or nature of his claim, the anti-SLAPP Act cannot be defeated by "artful pleading." (See *Baral v. Schnitt* (2016) 1 Cal.5th 376, 393.) This is precisely why, as discussed in part IV, *ante,* the trial court is not limited to the four corners of the complaint and is required to consider extrinsic evidence. That evidence showed that, in

the words of *Wilson*, the stipulation was "'the wrong complained of.'" (*Wilson v. Cable News Network, Inc., supra,* 7 Cal.5th at p. 884.) And, in the words of *Park*, "'the defendant's act underlying the plaintiff's cause of action [was] *itself* . . . an act in furtherance of the right of petition or free speech."[4] (*Park v. Board of Trustees of California State University, supra,* 2 Cal.5th at p. 1063.)

Johnson accuses us as focusing improperly on the fact that he *learned about* Humphrey's claim through the stipulation. Not so. We focus on the fact that Humphrey's claim is *based on* the stipulation. We agree that how Johnson learned about it is irrelevant.

Finally, Johnson argues that Humphrey's claim to the property is not based *solely* on the stipulation. When Humphrey filed his original complaint in the prior action, before the stipulation even existed, he alleged (though somewhat vaguely) that he had a right to the property by inheritance from his deceased wife, by adverse possession, and/or by abandonment. Johnson, however, demurred to that complaint, arguing that the claimed right was disproven by matters of which the court could take judicial notice. In 2013, Humphrey dropped these nebulous claims and entered into the stipulation; he has staked his claim to the property exclusively on the stipulation ever since.

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[4] Johnson's very protest that the stipulation was "collusi[ve]" and a "sham" (see part VII, *ante*) only highlights the fact that this action, as against Humphrey, is in essence an attack on the stipulation.

Johnson points to evidence that in 2007, 2008 and 2009, Humphrey attempted to make tax payments on the property.[5] Humphrey never claimed, however, that he made those payments for five years, as would be necessary to give rise to a right to the property as a matter of adverse possession (see *Buic v. Buic* (1992) 5 Cal.App.4th 1600, 1604); he merely argued that they interrupted *Johnson's* adverse possession.

In sum, then, we conclude that both of Johnson's causes of action arose from the stipulation, which was protected activity.

B. *Probability of Prevailing*.

Humphrey also argues that Johnson did not establish a probability of prevailing. Unhelpfully, Johnson's respondent's brief did not respond to this contention. However, we cannot treat his silence as a concession. Even when the respondent wholly fails to file a brief, the appellant is not automatically entitled to a reversal. (*Petrosyan v. Prince Corp.* (2013) 223 Cal.App.4th 587, 593, fn. 2.) "[T]he appellant[] still bears the affirmative burden to show error. [Citation.]" (*In re Marriage of Rifkin & Carty* (2015) 234 Cal.App.4th 1339, 1342, fn. 1.)

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[5] As further evidence of this, Johnson has also attached two letters to his brief. Because they are not part of the appellate record, must we disregard them. (Cal. Rules of Court, rule 8.204(d).)

Significantly, however, Johnson did not respond to this contention below, either. Moreover, he did not introduce any evidence whatsoever to support his claims.[6] He specifically assured the trial court that it did not need to consider probable validity.

In part VII.A, *ante*, we held that Humphrey carried his burden of showing that Johnson's claims arise from protected activity. This shifted the burden to Johnson to demonstrate that his claims had at least minimal merit. Because he did not even try to do so, the trial court should have granted the anti-SLAPP motion.

In his brief in lieu of oral argument, Johnson argued for the first time that he did show a probability of prevailing, citing *Humphrey's* evidence in *support* of the motion. He forfeited this argument by failing to raise it below. "As a rule, parties are precluded from urging on appeal any points that were not raised before the trial court. [Citation.] To permit a party to raise a new theory is both unfair to the trial court and unjust to the opposing litigant. [Citation.]" (*In re Marriage of Walker* (2006) 138 Cal.App.4th 1408, 1418.)

That is not to say that, if not forfeited, it would have merit.

Johnson argues that the judgment in the prior action established, as a matter of collateral estoppel, that Humphrey's claim to the property, based on the stipulation, is invalid. We may assume, without deciding, that this is correct. Even if so, however, to prevail on his second cause of action (adverse possession), Johnson had to prove not only

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[6] He did request judicial notice, but only of (1) the operative complaint in the prior action and (2) the operative complaint in this action.

that Humphrey's claim was invalid, but that his own claim was valid. Likewise, to prevail on his first cause of action (declaratory relief identifying Janelunas's intestate successors), he would have to show that he had some claim to the property that gave him standing to seek such declaratory relief — i.e., again that his own claim was valid.[7]

Johnson therefore argues that Humphrey's own evidence showed that Johnson was entitled to the property as a matter of adverse possession. Adverse possession requires possession that is open, notorious, hostile, exclusive, and continuous for five years. (Code Civ. Proc., § 325, subd. (b); *Kraus v. Griswold* (1965) 232 Cal.App.2d 698, 709.) It requires timely payment of all taxes on the land for five years, as shown by certified records of the county tax collector. (Code Civ. Proc., § 325, subd. (b).) It also requires that the land has been either protected by a substantial enclosure, cultivated, or improved. (Code Civ. Proc., § 325, subd. (a); *Hayes v. Mitchell* (1960) 184 Cal.App.2d 301, 305.)

There is no evidence that Johnson was in possession of the property for five years. A fortiori, there is no evidence that his possession was open and notorious. He points to photos taken in 2013, which show an illegible sign, and in 2016, which show a "no trespassing" sign. However, there is no evidence that Johnson put up either sign, nor that any "no trespassing" sign was there for five years.

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[7] Johnson wants us to address the third (fraud) cause of action. But he voluntarily dismissed that cause of action before the anti-SLAPP motion was even filed. Admittedly, the parties and the trial court were somewhat confused about this below, but eventually the trial court got things straightened out; in its ruling, it noted correctly that this cause of action had been dismissed and refused to address it further. Accordingly, this appeal presents no issue regarding that cause of action.

Johnson claims the same photos show substantial enclosure. They do show walls, but not that the walls substantially enclose the property. Johnson himself asserts that there are "at least" two walls, on opposite sides. (See *Daniels v. Gualala Mill Co.* (1888) 77 Cal. 300, 304 ["substantial enclosure" requires that the land be "protected on all sides"].) And again, there is no evidence that the walls were there for five years. (See *Baldwin v. Durfee* (1897) 116 Cal. 625, 627.)

Finally, Johnson points to evidence that he paid taxes. That evidence consists of assorted receipts. Some have Johnson's name; some have the name of one Randall Witte; and some have no name at all. Most important, however, they are not certified copies, as Code of Civil Procedure section 325, subdivision (b) requires.

In sum, then, Johnson did not show a probability of prevailing.

VIII

DISPOSITION

The order appealed from is reversed. The trial court is directed to grant Humphrey's anti-SLAPP motion. Humphrey is awarded costs on appeal against Johnson, including attorney fees. (§ 425.16, subd. (c)(1).)

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RAMIREZ
P. J

We concur:

SLOUGH
J.

RAPHAEL
J.